"prescription order" (A.R.S. §32-1901(73)). A "prescription order" must contain the following elements: 1) the date it was issued; 2) the name and address of the person for which the drug is ordered; 3) if refills are authorized; 4) the name, address, and telephone number of the prescribing medical practitioner; 5) the name of the drug; 6) the strength of the drug; 7) the dosage form of the drug; 8) the quantity of the drug; and 9) the directions for use. (A.R.S. §32-1968(C)).

B. A written certification does not meet the requirements of a prescription.

¶43. On the other hand, a written certification under the AMMA does not require the same statutory elements as a prescription order. A.R.S. §36-2801(18) defines a written certification as:

> 18. "Written certification" means a document dated and signed by a physician, stating that in the physician's professional opinion the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. ...

A written certification is not the same as a prescription. The AMMA does not contain any provision stating that a written certification (as defined above) is the same as a prescription for purposes of the prescribed drug exception in A.R.S. §28-1381(D). A written certification does not refer to the strength of the marijuana, the dosage amounts, the quantity of marijuana to be consumed with each dose,

directions for use, or if refills are authorized. (See St. App. Ex. 3, DHS Medical Marijuana Physician Certification form.)

¶44. There is yet another point distinguishing a written certification from a prescription. A regular patient obtains a prescription for "other medication under the direction of a physician" (A.R.S. §36-2813(C)) via a prescription order. On the other hand, an AMMA medical marijuana "written certification" does not give the person permission to obtain medical marijuana. A written certification only allows him to apply for a registration identification card (the Medical Marijuana card given by the Petitioner to Deputy. Todd). (A.R.S. §36-2804.02). The certification must be presented to the Arizona Department of Health (A.R.S. §36-2801(4)) which then actually issues a registry identification card (A.R.S. §36-2801(14)) to the person. Contrary to the Petitioner's "process" argument (Petition, p. 19-20) the vast difference between how drugs are "prescribed" and how medical marijuana is distributed shows a legislative intent to separate the two systems.

C. A prescription and a "written certification" involve different medical practitioners.

¶45. Another reason why a written certification is not the same as a prescription required for the A.R.S. §28-1381(D) affirmative defense is that the medical practitioners specialties authorized to write prescriptions in A.R.S. § 28-1381(D) are not the same as those authorized to write "written certificates" in AMMA.

¶46. A.R.S. §28-1381(D) lists medical practitioners from four areas of practice:

> D. A person using a drug as prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section.

The medical practitioners are licensed in four chapters of Title 32: chapter 7, Podiatry; chapter 11, Dentistry; chapter 13, Medicine and Surgery; and chapter 17, Osteopathic physicians and surgeons. Only prescriptions issued by these medical practitioners qualify for the affirmative defense.

¶47. The term "physician" authorized to issue a "written certification" under the AMMA does not include the same areas of medicine as are listed in the DUI exception. The AMMA list of physicians who may sign a "written certification" is found in A.R.S. §36-2801(12) and includes medical practitioners licensed in four chapters of Title 32: chapter 13, Medicine and Surgery; chapter 17, Osteopathic physicians and surgeons; chapter 14, Naturopathic physician; and chapter 29, Homeopathic physician.

> D. Marijuana, a Schedule I controlled substance under Arizona law, cannot be prescribed by physicians

¶48. Finally, "written certifications" cannot be the same as "prescriptions" because a physician cannot issue a prescription order for marijuana. Marijuana is a Schedule I controlled substance (A.R.S. §36-2512(A)(3)(o)) and the only medical practitioner that can legally handle marijuana is a pharmacist who is a "registrant"

under the Federal Controlled Substances Act (CSA) (see A.R.S. §36-2522(A); §36-2524; §36-2531). Registrants are tightly controlled. The Drug Enforcement Agency's Practitioner's Manual, 2006 edition[4], states in Section II, General Requirements, concerning legal use of Schedule I drugs: "The CSA allows for bona fide research with controlled substances in Schedule I, provided [they meet certain criteria] ... Researchers who meet these criteria must obtain a separate registration to conduct research with a Schedule I controlled substance." Consequently, a "written certification" authorizing the "medical use" of marijuana cannot be the equivalent of medication prescribed by a medical practitioner because medical practitioners cannot prescribe marijuana to patients.

E. Marijuana is not a legal drug for §28-1381(A)(3) purposes.

¶49. A.R.S. §28-1381(A)(3) makes it an offense to have a metabolite of an illegal substance defined in §13-3401 in one's body "while driving.". A.R.S.§28-1381(A)(3) does not penalize Petitioner for the "use" of marijuana. Marijuana is defined as "all parts of any plant of the genus cannabis" in both the illegal drug statutes and the AMMA (A.R.S. §13-3401(19) and A.R.S. §36-2018(8)). The Petitioner argues that medical marijuana should be a legal drug for (A)(3) purposes and does not fall under the condemnation as an illegal drug (Petition, p. 20, ¶42-43) and that the definition of a prescribed "drug" under A.R.S. §28-1381(D)

[4] (www.deadiversion.usdoj.gov/pubs/manuals)

includes medical marijuana (which is in direct contradiction to A.R.S. §28-1381(A)(3) prohibition against having metabolites of a drug defined in §13-3401 – such as marijuana). He supports these assertions by equating "medical use" to "driving". While it is true that "medical use" of marijuana has been decriminalized at the state level, for purposes of "driving" infractions, marijuana is still an illegal drug – a Schedule I controlled substance and a controlled drug listed in A.R.S. § 13-3401. As such, in order to take advantage of the affirmative defense in subsection D, it must be prescribed, which it cannot be. It must be taken as prescribed. In other words, in the amounts, at the times, and in the manner prescribed. No such prescription with instructions on dosage and use is or can be shown under the current law. No statue has been enacted to make "driving" with a marijuana metabolite in one's system legal.

F. Metabolite cannot be "sole" evidence to prove impairment.

¶50. The Petitioner misreads the law when arguing that he is being punished "*solely* because of the presence of THC in his body" and that this is contrary to the language of A.R.S. §36-2802(D). (Petition, p. 15-16 ¶¶34-35). A.R.S. §36-2802(D) merely prevents the State from proving a person is "under the influence" under A.R.S. §28-1381(A)(1) when the sole evidence presented to establish impairment is the presence of insufficient concentrations of marijuana metabolite. A.R.S. §36-2802(D) states:

> This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:
>
> D. Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while **under the influence** of marijuana, except that a registered qualifying patient shall not be considered to be **under the influence** of marijuana **solely** because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

(Emphasis added.)

¶51. The only place the DUI statutes reference being "under the influence" of a drug is in A.R.S. § 28-1381(A)(1) the Driving Under the Influence While Impaired to the Slightest degree DUI charge. The Petitioner was not charged with that offense. The only charge facing the Petitioner, A.R.S. § 28-1381(A)(3), is a per se offense, and does not require proof of "driving under the influence."

¶52. The Petitioner is not "being punished *solely* because of the presence of THC in his body." He is accused of violating a statute that makes it illegal to **drive** with a controlled substance or its metabolite in his system. (see A.R.S. §28-1381(A)(3)). Contrary to his assertion, A.R.S. §36-2802(D) does not "condone" driving with a metabolite in one's body.

¶53. The Petitioner attempts to support his assertion that it is improper to prosecute him for *solely* having marijuana metabolite in his body (Petition, p. 15-16 ¶¶34-35) by again presenting his argument that medical marijuana is analogous

to a drug issued by a valid prescription and qualifies for the exception under A.R.S. §28-1381(D).

¶54. A medical marijuana card cannot be used as an affirmative defense to A.R.S. §28-1381(D) because medical marijuana is obtained by the registration and distribution process defined in the AMMA and is not a "prescribed" drug.

IV. The Petitioner asks the court to use his projections of legislative intent to add language and meaning to both the AMMA and DUI statutes

¶55. The Petitioner asserts that A.R.S. §36-2811(B) prohibits his prosecution for driving while having marijuana metabolites in his system. (Petition, p. 11, ¶24). He speculates that it is the legislative intent "that medical marijuana was to be treated just like any other prescription drug." (Petition, p. 14, ¶30). The Petitioner contends that the legislature did not need to amend A.R.S. §28-1381(D) to add that a marijuana certification is to be treated like a prescription, and asks this Court to read that assumption into A.R.S. §36-2813(C) (Petition, p. 15, ¶32-33). The Petitioner asserts that the legislative intended for A.R.S. §36-2802(D) to legalize marijuana metabolites in a driver's body contrary to ARS §28-1381(A)(3). (Petition, p. 16, ¶35). The Petitioner asserts the legislature intended for medical marijuana to be a drug that qualified for the affirmative defense under §36-2802(D) (Petition, p. 20 ¶42). Petitioner asserts that

if AMMA did not want a medical marijuana card to be an affirmative defense then it would have said so in the statute. (Petition, p.22, ¶45).

¶56. Contrary to the Petitioner's request, courts may not amend laws to fill in or add to what the legislature has not written. When interpreting enactments, courts are not to supply meaning that is not found in the specific provision. *Kiley v. Jennings, Strouss and Salmon*, 187 Ariz. 136, 927 P.2d 796 (App. 1996). Absent constitutional infirmities, courts "are required to apply statutes as written." *City of Flagstaff v. Mangum*, 164 Ariz. 395, 401, 793 P.2d 548, 554 (1991). The judiciary should not add to a provision that which the enacting body deems unnecessary. *Werner v. Prins*, 168 Ariz. 271, 812 P.2d 1089 (App. 1990).

¶57. Recently, this Court, while addressing the definition of metabolite under A.R.S. §28-1381(A)(3), also tangentially addressed the relationship between the AMMA and the DUI statutes and stated: "As an initiative measure proposed and approved by the people of Arizona, the AMMA's adoption is immaterial to the determination of legislative intent as it relates to adoption of the DUI statutes." *State ex rel. Montgomery v. Harris ex rel. County of Maricopa,* 301 P.3d 580, 583 (App., 2013).

V. Due process rights.

¶58. Finally, the Petitioner asserts, for the first time[5], that he has a due process right to use his medical marijuana card as a defense to a violation of the "driving" statutes in Title 28 (Petition, p. 24 ¶48-49). Because he did not raise this argument below, he is precluded from obtaining relief on that basis. The failure to **properly** raise issues in the lower court will preclude a defendant from asserting the issue in the appellate court. *State v. Fendler,* 127 Ariz. 464, 622 P.2d 23 (App. 1980), cert. denied, 452 U.S. 961, 101 S.Ct. 3108, 69 L.Ed.2d 971 (1981). Absent a finding of fundamental error, failure to raise an issue in the lower court waives the right to raise the issue later in the higher court. *State v. Gendron,* 168 Ariz. 153, 812 P.2d 626 (1991). Although there is no merit to the Petitioner's assertion, the State will not respond due to preclusion.

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[5] Petitioner argued in Superior court that he wanted to say he had a medical marijuana card in the context of presenting an affirmative defense (Pet. App. Ex 7, p. 11, ln 1-4, p.16, ln 14-15, p.17, ln 13-14) but he never argued "Due Process" and he did not make the argument to the Apache Junction Court.

CONCLUSION

¶59. Based on the foregoing, the State urges this Court to decline jurisdiction of the special action. However, if jurisdiction is accepted, the State asks that relief be denied.

Respectfully submitted this 16th day of August, 2013.

M. LANDO VOYLES
PINAL COUNY ATTORNEY

By _____/s/_____
Ronald S. Harris
Deputy County Attorney
Attorney for Real Party in Interest

CERTIFICATE OF COMPLIANCE

STATE OF ARIZONA)
)ss.
County of Pinal)

The State of Arizona, pursuant to Rule 7 of the Arizona Rules of Procedure for Special Actions, certifies that the text in this Response to Petition for Special Action is double-spaced, contains 6,417 words, and uses the following proportionately spaced type face: 14-Point Times New Roman.

RESPECTFULLY SUBMITTED this 16th day of August, 2013.

M. LANDO VOYLES
PINAL COUNTY ATTORNEY

By _____*/s/*_____
Ronald S. Harris
Deputy County Attorney

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
)ss.
County of Pinal)

RONALD S. HARRIS hereby certifies that he is a Deputy Pinal County Attorney in the above-entitled action and that on the 16th day of August, 2013, he caused to be delivered and/or mailed the following:

RESPONSE TO PETITION FOR SPECIAL ACTION

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By */s/*
Ronald S. Harris
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